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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 683

BEULAH GREEN, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statutes and Regulations	2
Statement of the Case	3
Reasons for Granting of the Writ	5
Conclusion	11
Appendixes:	
A - Opinion of the United States Court of Appeals for the Fifth Circuit	12
B - Judgment of the United States Court of Appeals for the Fifth Circuit	15
C - Order Extending Time to File Petition for Writ of Certiorari	16

TABLE OF CITATIONS

Page

CASES

Barker v. Commissioner, 250 F.2d 195 (2nd Cir. 1957) 7

Bel v. U.S., 160 F.Supp. 360 (WD La. 1958) 8

Brown v. United States, U. S. District Court ED Ark. LR-64-C-116, 12-14-65, 66-1 USTC ¶9153 9

Burton-Sutton Oil Co. v. Commissioner, 328 U.S. 25 (1946) 6

Dann, Robert M., 30 T.C. 499 (1958) 9

Freund, Del, v. United States, 367 F.2d 776 (7th Cir. 1966) 8

Gitziner, Ralph S., et al. v. United States, Civil Action No. 3050, 67-1 USTC ¶9398 9

Gowans v. Commissioner, 246 F.2d 448 (9th Cir. 1957) 6

Green, S. L., 35 T.C. 1065 (1961) 10

Griffith v. United States, U. S. District Court Wyoming, 180 F.Supp. 454 (January 27, 1960) 8

Johnson, C. E., T.C. Memo. 1963-321, 22 TCM 1682 10

Kirby Petroleum Co. v. Commissioner, 326 U.S. 599 (1946) 6

Laudenslager v. Commissioner, 305 F.2d 687 (3rd Cir. 1962), cert. denied 371 U.S. 947 8

Linehan v. Commissioner, 297 F.2d 276 (1st Cir. 1961) 6

Rabiner v. Bacon, 373 F.2d 537 (8th Cir. 1966) 8

TABLE OF CITATIONS

	Page
Sanders v. United States, U. S. District Court, Eastern District, South Carolina, 1960-2 USTC ¶9691 (August 8, 1960)	8
Schreiber, Erwin A., et al. v. United States, decided December 21, 1966, 262 F.Supp. 346	9
Turner v. U. S., 226 F.Supp. 970	8
Vance, S. E., Estate, T.C. Memo. 1960-167, 19 TCM 904	10
White v. U.S., 311 F.2d 399 (10th Cir. 1962)	7

IN THE

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No. _____

BEULAH GREEN, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled cause on May 11, 1967.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at ..... F.2d ..... (Tr. of Record, p. 48) and is reprinted in Appendix "A", infra, page 12.

JURISDICTION

The judgment of the Court of Appeals was entered on June 5, 1967 (Appendix "B", infra, page 15). On August 11, 1967, the time for filing of petition for writ of certiorari was extended by order of Mr. Justice Abe Fortas to and including October 6, 1967 (Appendix "C", infra, page 16). The jurisdiction of this court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether petitioner, Beulah Green, is entitled to report payments which she received during 1961 from Florida Rock Products Company in the amount of $48,839.21 pursuant to a limestone lease contract dated April 10, 1959, as long-term capital gain for Federal income tax purposes, or whether such income is taxable as ordinary income subject to the allowance for depletion, as determined by the Commissioner.

This issue is governed by a legal determination as to whether or not petitioner under the contract in question retained an "economic interest" in the minerals. If she did retain such an interest, the income is taxable as ordinary income, and if she did not, then she properly reported her gain as long-term capital gain.

This is a companion case to two others decided at the same time by the Fifth Circuit, which are pending on application for certiorari before the Court, namely *Nathaniel C. Wood and Gertrude L. Wood v. United States* and *United States v. T. D. Peeler and Mrs. T. D. Peeler.*

STATUTES AND REGULATIONS

Statutes and regulations directly involved are Section 611 (a) of the Internal Revenue Code of 1954 and Treasury Regulations Section 1.611-1(b).

STATEMENT OF THE CASE

The petitioner originally brought this action as a suit for refund for a deficiency in personal income tax for 1961 in the United States District Court for the Middle District of Florida at Jacksonville, Florida.

On April 10, 1959, petitioner entered into a lease contract with one D. W. Watkins as agent for Florida Rock Products Company (hereinafter called Florida Rock), wherein she conveyed to Florida Rock the right to mine and remove limestone on approximately 100 acres of land which she had owned for many years in Suwannee County, Florida.

The relevant provisions of the lease contract may be summarized as follows:

(a) Petitioner granted Florida Rock the exclusive right to mine, crush and ship lime rock from 170 acres in question for a period of ten years from April 10, 1959.

(b) Under the contract, Florida Rock agreed to pay petitioner compensation for granting the lime rock rights and privilege the sum of five cents for each ton of lime rock mined and removed from the premises.

(c) The contract provided for a minimum advance royalty of $3,000.00 per year commencing May 1, 1959. Florida Rock was entitled to credit for the advance royalties for having it retain one-half of each of the monthly royalty payments until the advance royalty was repaid in full. It was further provided, however, that petitioner would be entitled to not less than $3,000.00 per year during the term of the lease or any renewal thereof, regardless of whether actual mining operations were then being done.

(d) Under the contract, petitioner warranted title to the lime rock covered by the agreement to Florida Rock or its

successors and assigns. Petitioner was also obligated to pay the annual ad valorem taxes assessed against the entire property.

(e) Florida Rock was given the option to renew the lease for an additional ten years. It also had the right to cancel the contract at any time upon written notice to petitioner upon the payment of $500.00, if in the opinion of Florida Rock the limestone could not be mined at a profit to it. There was no affirmative obligation on behalf of Florida Rock to mine the property.

The petitioner in filing her 1961 Federal income tax return reported the payments she received under the contract as long-term capital gain. The Commissioner, upon audit of her return, determined that she had retained an economic interest in the lime rock in place and that the payments received were taxable as ordinary income as royalties and subject to a 5 per cent depletion allowance. Petitioner paid the deficiency and within the time prescribed by law filed a claim for refund and thereafter instituted a suit in the United States District Court for the Middle District of Florida at Jacksonville, Florida. The District Court entered judgment in petitioner's favor. The District Court's findings of fact and conclusions of law appear at pages 33-43, inclusive, of the Transcript of Record before the Court of Appeals for the Fifth Circuit.

The Fifth Circuit reversed the decision of the District Court and held that under the contract in question, petitioner had retained an economic interest and that, therefore, the moneys received were taxable as ordinary income and not long-term capital gain.

At the Government's request, the Court of Appeals scheduled oral argument on the same day in petitioner's case and the two companion cases of *Wood, et al. v. United States* and

United States v. T. D. Peeler, et al. We have included copies of the opinion of the Court of Appeals in both the *Wood* and *Peeler* cases (see page 53 and page 77 of Transcript of Record). The petition for writ of certiorari was filed in the *Wood* case on August 9, 1967, and carries Docket No. 475, and the petition in the *Peeler* case was also filed August 9, 1967, and carries Docket No. 471.

REASONS FOR GRANTING OF THE WRIT

The Court of Appeals in reversing the District Court and holding that petitioner was not entitled to long-term capital gains treatment with respect to the receipt of moneys in 1961 pursuant to the contract for the extraction of lime rock from her property by Florida Rock Products Company pursuant to the contract of April 1959 has erroneously interpreted and applied the doctrine of retained economic interest as that term has been developed and defined for Federal income tax purposes, and the decision of the Court of Appeals in this connection is in direct conflict with the decisions of several other circuits which have considered the point of law involved.

1. In the instant case, petitioner attempted to dispose of certain lime rock located on lands which had belonged to her for many years under a lease contract under which she was to be paid a fixed and absolute sum of five cents per ton from all lime rock and limestone extracted from her property. She was not entitled in any way to share in the proceeds of the sale of the limerock by Florida Rock, nor were any of her payments conditioned upon the sale of the mineral by Florida Rock. In addition, there was no affirmative obligation imposed upon Florida Rock to extract the mineral, but its action in this regard was purely optional.

As we understand the concept of "retained economic interest" as defined by this Court, it means a possibility of profit which is dependent solely upon the extraction and sale of minerals. *Kirby Petroleum Co. v. Commissioner,* 326 U.S. 599 (1946); *Burton-Sutton Oil Co. v. Commissioner,* 328 U.S. 25 (1946). Petitioner contends that the weight of authority in this connection is that payments received by a taxpayer under a contract granting the exclusive right to remove the mineral from the taxpayer's property at a fixed price per unit as and when removed constitutes capital gain and not ordinary income. For this reason, petitioner contends that the Court of Appeals in this case has improperly applied the doctrine of retained economic interest and has thereby improperly denied her the refund to which she is legally entitled in accordance with the judgment of the District Court below.

2. The decision of the Court of Appeals is in direct conflict with the decision of the Court of Appeals for the Fifth Circuit in the case of *Linehan v. Commissioner,* 297 F.2d 276 (1st Cir. 1961).

In that case, the taxpayer granted a sand and gravel company exclusive right to excavate sand and gravel from taxpayer's property at a fixed price per cubic yard. The Court held that the taxpayer had no "economic interest" in the mineral taken from his property after its severance and in each instance he sold sand and gravel for fixed prices per cubic yard without reference to the price received or profits, if any, made by the exploitators.

3. The decision of the Court of Appeals is also in direct conflict with the decision of the Court of Appeals for the Ninth Circuit in *Gowans v. Commissioner,* 246 F.2d 448 (9th Cir. 1957). In this case, the taxpayer entered into a contract with a construction company under which the company was

to remove all black sand from taxpayer's property within five years. The contract referred to the payment as royalties. The construction company was to pay for the sand based upon a unit price of 40 cents per cubic yard. The Court held that under these circumstances, the taxpayer Gowans had not retained an economic interest in the minerals in place and that, therefore, the royalties received were taxable as long-term capital gain.

4. The decision of the Court of Appeals is also in direct conflict with the decision of the Court of Appeals for the Second Circuit in *Barker v. Commissioner*, 250 F.2d 195 (2nd Cir. 1957). In this case, the taxpayer executed a contract to sell sand and gravel on her property. The agreement provided for advance and minimum royalties covering a 15-year period. The buyer was not obligated to remove any of the material. The payments were made at the rate of six cents per cubic yard of gravel extracted. The contract in question was referred to as a contract for the sale of sand and gravel. The Court, speaking through Judge Medina, held the transaction resulted in the sale of gravel in place and not a lease and that the taxpayer was entitled to treat the proceeds as long-term capital gain.

5. The decision of the Court of Appeals is also in direct conflict with the decision of the Court of Appeals for the Tenth Circuit in *White v. U. S.*, 311 F.2d 399 (10th Cir. 1962). In this case, taxpayer by mineral deed sold and conveyed certain property for a cash consideration of $175,000.00 and a royalty of ten per cent of the value of the minerals mined. In the case, the assignee did not undertake any obligation to develop the mineral interest. The Court of Appeals discussed many of the cases dealing with the concept of economic interest and found that the right to the royalty did not constitute economic interest and that, therefore, the taxpayer was entitled to capital gain, and not ordinary income.

6. It should also be pointed out to the Court that there are cases in other circuits which support the Court of Appeals decision in this case and create further conflict and confusion as between the various circuits. The decision of the U. S. Court of Appeals for the Third Circuit in *Laudenslager v. Commissioner*, 305 F.2d 687 (3rd Cir. 1962), cert. denied 371 U.S. 947, supports the decision of the Fifth Circuit. More recently, another such case is the decision of the Court of Appeals for the Seventh Circuit in *Del Freund v. United States*, 367 F.2d 776 (7th Cir. 1966). Another recent decision supporting the decision of the Fifth Circuit is the decision of the Eighth Circuit in *Rabiner v. Bacon*, 373 F.2d 537 (8th Cir. 1966).*

It is, therefore, submitted that the Court should grant certiorari in this case for the purpose of resolving once and for all the substantial and continuing conflict between the circuits in cases of this kind where land owners have disposed of minerals in place under contracts simply calling for a payment based on a fixed price per unit as and when extracted by the purchaser.

7. Although there is considerable confusion among the trial courts confronted with the legal issue involved in this case, there are a number of District Court decisions substantially identical to the instant case, which have reached the conclusion that the taxpayer had made a sale and was, therefore, entitled to long-term capital gain. *Sanders v. United States*, U. S. District Court, Eastern District, South Carolina, 1960-2 USTC ¶9691 (August 8, 1960); *Griffith v. United States*, U. S. District Court Wyoming, 180 F.Supp. 454 (January 27, 1960); *Bel v. U. S.*, 160 F.Supp. 360; *Turner v. U. S.*,

* We think it highly significant that the Court of Appeals in *Rabiner* in Footnote 2 calls attention to the conflict between its decision, the decision of the Third Circuit in *Laudenslager*, and the First Circuit's decision in *Linehan v. Commissioner*, supra.

226 F.Supp. 970, and *Brown v. United States,* U. S. District Court, ED Arkansas, LR-64-C-116, 12-14-65, 66-1 USTC ¶9153.

As recently as March 22, 1967, the U. S. District Court for the Southern District Ohio, Wes. Div., in the case of *Ralph S. Gitziner, et al., v. United States,* Civil Action No. 3050, reported by *Commerce Clearing House* at 67-1 USTC ¶9398, held that payments received by a taxpayer under a contract granting the exclusive right to remove limestone from the taxpayer's property at a fixed price per unit removed constituted capital gains. The Court, looking through the substance of the agreement, determined that the taxpayer had no economic interest in the limestone taken from his property, after its severance, for in each instance, he sold limestone for a fixed price per ton without reference to the price received or the profits made by the exploitators.

A further illustration of the confusion caused by the conflicts in the Circuit is the decision of the U. S. District Court, Eastern District, Wisconsin, of *Erwin A. Schreiber, et al. v. United States,* decided December 21, 1966, 262 F.Supp. 346. In the *Schreiber* case, the District Court held that an agreement by farm owners granting a sand and gravel company the right to excavate their farm and remove sand, stone and gravel for a term of five years on the basis of a payment of 20 cents per cubic yard of the material removed, resulted in ordinary income to the owners and not long-term capital gain.

The Tax Court of the United States has vacillated on the issue apparently depending upon the Circuit in which the petitioner resided.

The Court in *Robert M. Dann,* 30 T.C. 499 (1958) held that the sale of top soil under a contract with payments provided at a fixed unit price resulted in capital gain, and not

ordinary income. See *S. E. Vance Estate*, T.C. Memo. 1960-167, 19 TCM 904, and *C. E. Johnson*, T.C. Memo. 1963-321, 22 TCM 1682. The Tax Court has held to the contrary in a similar case, *S. L. Green*, 35 T.C. 1065 (1961).

It should be noted by the Court that most, if not all, of the cases involving this issue involve relatively small land owners. If the Government's view of these cases ultimately prevails, then the only way a land owner can dispose of minerals in place at capital gain rates is to sell the fee simple title to his land or in some manner make a conveyance of the minerals in place for a lump sum consideration. The result of this would be to deprive the small land owner of obtaining the maximum price for his property and still retain the right to report his gain, if any, as long-term capital gain. In other words, a mining company will as a matter of business necessity have to discount the estimates of minerals in place in either purchasing the land or agreeing to pay a lump sum for the minerals in place in order to avoid loss through misjudgment or miscalculation as to the quantities involved.

On the other hand, if a land owner can enter into a contract to sell his minerals in place for a fixed unit price as and when the mineral is extracted, then he will be in a position to sell a capital asset to his maximum benefit without the loss of his right to report any gain as long-term capital gain.

CONCLUSION

For the reasons given, it is submitted that this petition for writ of certiorari should be granted, as well as the petitions pending in the companion *Wood* and *Peeler* cases.

Respectfully submitted,

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Jacksonville, Florida 32202

Attorney for Petitioner

Dated: October 4, 1967.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22846

UNITED STATES OF AMERICA,

Appellant,

versus

BEULAH GREEN,

Appellee.

Appeal from the United States District Court for the Middle District of Florida.

(May 11, 1967.)

Before RIVES, BELL and THORNBERRY, Circuit Judges.

PER CURIAM: This is a companion case to *Wood v. United States*, 5th Cir. 1967, . F.2d . . . ., and *United States v. Peeler*, 5th Cir. 1967, ... F.2d . . . ., decided this day. The sole issue is the same as in those cases—whether the taxpayer, by contractural agreement calling for the ex-

traction of minerals from her land, retained an "economic interest" in the minerals so that compensation derived under the contract was properly taxed as ordinary income.

Taxpayer Green owned a 170-acre tract of land containing lime rock deposits in Suwanee County, Florida. In April, 1959, taxpayer entered into a "lease contract" with Florida Rock Products Company ("Florida Rock"). This agreement called for exploitation of the lime rock deposits by Florida Rock. It was to be in effect for ten years, Florida Rock having the option to renew for an additional ten years. Taxpayer was to be guaranteed a minimum yearly royalty payment and was to receive a fixed royalty for each ton of rock extracted. If Florida Rock were to decide at any time that the mineral deposits could not be profitably exploited, it could terminate the lease upon payment of Five Hundred Dollars ($500.00). Pursuant to this agreement, Florida Rock undertook extensive operations on taxpayer's land.

This controversy concerns the royalty payments made to taxpayer in 1961. Taxpayer reported the payments as proceeds from a sale of capital assets. The Commissioner determined, however, that the proceeds were properly taxable as ordinary income and assessed a deficiency. The assessment was duly paid, and this litigation followed the Commissioner's disallowance of taxpayer's claim for refund. The case was presented to the district court upon stipulated facts and was heard by the court sitting without a jury. The district court ruled for the taxpayer, holding that she had effectively sold the minerals in place retaining no economic interest. We reverse.

The district court was of the opinion that the decision of this court in *Crowell Land & Mining Corp. v. Commissioner*, 5th Cir. 1957, 242 F.2d 864, controlled the present contro-

versy. With this conclusion we disagree. A careful review of the record and the pertinent cases convinces us that taxpayer retained by the lease agreement with Florida Rock an economic interest in the lime rock deposits. Our rationale in reaching this conclusion is identical to that set forth in *Wood v. United States, supra,* and need not be repeated here. It is sufficient to say that nothing in the present case renders inapplicable our holding in *Wood*. We therefore REVERSE with instructions to the district court to enter judgment accordingly.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH DISTRICT

October Term, 1966

No. 22846

D. C. Docket No. 64-228-Civ-J

UNITED STATES OF AMERICA,

Appellant,

versus

BEULAH GREEN,

Appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before RIVES, BELL and THORNBERRY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed with instructions to the said District Court to enter judgment in accordance with the opinion of this Court.

May 11, 1967

Issued as Mandate: June 5, 1967.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1967

BEULAH GREEN,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including 6 October, 1967.

/s/ Abe Fortas
Associate Justice of the Supreme Court of the United States

Dated this 11th
day of August, 1967

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 683

BEULAH GREEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question here is whether payments petitioner received for the right to extract and remove minerals from her land were long-term capital gain, as she claimed, or depletable ordinary income, as the court below held.

Petitioner entered into a "lease contract" that entitled the "lessee" to mine and remove lime rock from petitioner's land in consideration of a "royalty" of five cents per ton removed with a "minimum advance royalty" of $3,000 per year guaranteed. The agreement was for a ten-year period, and the "lessee" had the option to renew the "lease" for an additional ten years. But the agreement also empowered the "lessee"

281-085—67

to terminate the arrangement at any time, upon written notice and payment of $500, if the "lessee" was of the opinion that mining could not be continued at a profit. (Pet. App. D 19–21.)

In her 1961 income tax return, petitioner reported payments received under the contract as long-term capital gain. The Commissioner determined that the receipts were depletable ordinary income (Pet. App. D 22). Petitioner paid the resulting deficiency and sued for a refund (Pet. App. D 18–19). The district court ruled in favor of petitioner (Pet. App. D 21–22). The court of appeals reversed, holding that petitioner had retained an "economic interest" in the minerals and, accordingly, that the "royalty" payments were depletable ordinary income (Pet. App. A 12–14). This decision is sound and further review is unwarranted.

1. Petitioner errs in her assertion (Pet. 6) that "the weight of authority" requires capital gain treatment of payments received by a landowner as consideration for the right to remove minerals from the land, when such payments are a fixed amount per unit as and when removed. In a long line of cases this Court has made it clear that, where a landowner grants the right to extract and remove minerals from his land in consideration of payments dependent solely on extraction, the payments he receives are depletable ordinary income and not capital gain. *E.g.*, *Palmer* v. *Bender*, 287 U.S. 551, 557; *Commissioner* v. *Southwest Expl. Co.*, 350 U.S. 308, 314. It does not matter whether the grantor's compensation is payable in cash rather than kind, *Helvering* v. *Twin Bell*

Syndicate, 293 U.S. 312, represents a percentage of the gross revenue, *Burnet* v. *Harmel,* 287 U.S. 103; *Palmer* v. *Bender, supra,* or of the net profits, *Kirby Petroleum Co.* v. *Commissioner,* 326 U.S. 599, or, as in the present case, a fixed amount per ton of minerals removed, *Bankers Coal Co.* v. *Burnet,* 287 U.S. 308; *Douglas* v. *Commissioner,* 322 U.S. 275, 280.

Accordingly, the court of appeals properly ruled here that petitioner's royalty was depletable ordinary income. Recent appellate decisions in four other circuits are squarely in accord. See *Royalton Stone Corp.* v. *Commissioner,* 379 F. 2d 298 (C.A. 2), petition for certiorari pending, No. 604, this Term; *Laudenslager* v. *Commissioner,* 305 F. 2d 686 (C.A. 3), certiorari denied, 371 U.S. 947; *Schreiber* v. *United States* (C.A. 7), decided July 17, 1967 (20 A.F.T.R. 2d 5126); *Freund* v. *United States,* 367 F. 2d 776 (C.A. 7); *Rabiner* v. *Bacon,* 373 F. 2d 537 (C.A. 8).

2. Petitioner asserts (Pet. 6–7) that the instant decision is in conflict with *Linehan* v. *Commissioner,* 297 F. 2d 276 (C.A. 1); *Gowans* v. *Commissioner,* 246 F. 2d 448 (C.A. 9); and *Barker* v. *Commissioner,* 250 F. 2d 195 (C.A. 2). A conflict with these cases is also asserted in the pending petition for certiorari in *Peeler* v. *United States,* 375 F. 2d 531, No. 471, this Term, which, like the instant case, the Fifth Circuit decided on authority of its decision in *Wood* v. *United States,* 377 F. 2d 300, petition for certiorari pending, No. 475, this Term.[1] For our response, we refer this Court to the discussion of *Linehan, Gowans*

[1] See also *Royalton Stone Corp.* v. *Commissioner,* 379 F. 2d 298 (C.A. 2), petition for certiorari pending, No. 604, this Term.

and *Barker* at pp. 4–8 of our memorandum in opposition in No. 471.[2]

3. Petitioner also asserts a conflict with *United States* v. *White*, 311 F. 2d 399 (C.A. 10). The court in *White* did not reach, but expressly reserved, the question whether royalty payments were depletable ordinary income reflecting a retained "economic interest" or capital gain from a sale. The court held only that a large lump sum downpayment was capital gain.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

RICHARD C. PUGH,
Acting Assistant Attorney General.

GRANT W. WIPRUD,
Attorney.

NOVEMBER 1967.

[2] Copies of that memorandum are being served on counsel for petitioner here.

U.S. GOVERNMENT PRINTING OFFICE: 1967